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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 IN re MTBE (ORANGE COUNTY WATER DISTRICT)

4  
5 04 CV 4968 (SAS)

6 -----x

7 New York, N.Y.  
8 October 6, 2014  
9 2:37 p.m.

10 Before:

11 HON. SHIRA A. SCHEINDLIN

12 District Judge

13 APPEARANCES (Via Telephone)

14 MIKE AXLINE  
15 DUANE MILLER  
16 TRACEY O'REILLY  
17 Attorneys for Plaintiff Orange County Water District

18 LISA GERSON  
19 Liaison Counsel & Exxon Mobil Corporation for Defendant

20 JEFF PARKER  
21 WHITNEY ROY  
22 Attorneys for Defendant Exxon Mobil

23 JOHN ANDERSON  
24 Attorney for Defendant ConocoPhillips

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Attorney for Defendant Lyondell

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1 APPEARANCES (Via Telephone)

2 DIANA MARTIN

Attorney for Defendant Tesoro

3 STEPHANIE WEIRICH

4 Attorney for Defendant BP

5 SAMANTHA CASE

Attorney for Defendant USA Gasoline

6 PETER CONDRON

7 Attorney for Defendant Shell

8 WILLIE EPPS

Attorney for Defendant Valero

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1 (In chambers)

2 THE COURT: Good afternoon. I'm just going to call  
3 the roll. I have a court reporter here. Many of you have been  
4 on conference calls with me you know it's very important you  
5 state your name every single time before you speak. Right now  
6 just say "here."

7 (Roll called)

8 Is there anybody who I didn't call on?

9 Okay. Silence means there's nobody I didn't call on.

10 So I know this is somewhat inefficient to try to have  
11 an oral argument on a telephone conference which is so  
12 difficult because of the difficulty of reporting it. The  
13 telephone, as you know, when you're speaking it cancels my  
14 voice so it's very hard for me to interrupt with a question.  
15 So I ask you to speak slowly and pause a lot.

16 I should have I guess had this oral argument when you  
17 were all here last week. I kind of missed that beat. Wasn't  
18 up to speed yet on the briefs. But when I did get up to speed  
19 I realized an oral argument would be useful.

20 The issue is not surprisingly -- I can quote from CMO  
21 No. 60 at page three. The issue is whether each release site  
22 identified as part of a focus plume contributed to  
23 contamination of the wells associated with that plume. If OCWD  
24 provides no proof that a particular release site contributed to  
25 such contamination and OCWD will not drop the release site from

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1 the focus plume, then defendants may file a motion for summary  
2 judgment. That was CMO No. 60

3 So the question is: Has Dr. Wheatcraft's model met  
4 that test of proof that a particular release site contributed  
5 to such contamination?

6 And that's a problem, given what he said. He says in  
7 his declaration that he has not, "Done any models in which we  
8 isolated a particular source and ran only that source."

9 He does say, however, that he used MTBE release data  
10 from each individual defendant in creating his model -- I don't  
11 quite know how he did that but he says he did that -- and that  
12 that data about each individual station helped him create the  
13 model. But then he, of course, goes on to say, "We've not done  
14 any models in which we isolate a particular source and ran only  
15 that source."

16 So the problem is his model seems to potentially  
17 connect a group of defendants' MTBE releases to a production  
18 well but it doesn't seem to show that any particular station's  
19 MTBE release caused OCW's injury.

20 Look, everything turns on my answering this question  
21 because if Wheatcraft fails to make that connection there's a  
22 whole lot of motions I don't need to reach. Everybody will be  
23 out based on that failure.

24 So it's a fairly important issue and I didn't want to  
25 decide it without giving counsel an opportunity to be heard.

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1           So Mr. Axline, Mr. Miller, or Ms. O'Reilly, which of  
2           the three of you would like to sort of defend what Wheatcraft  
3           does and whether he meets the standard that I set forth about a  
4           particular release site; that is, a station having contributed  
5           to the threatened or actual contamination.

6           Who wants to start?

7           MR. AXLINE: This is Mike Axline, your Honor. I will  
8           give it a go.

9           THE COURT: Okay.

10          MR. AXLINE: Part of my response to that is going to  
11          try to make sure that I fully explain what Mr. Wheatcraft did.

12          THE COURT: Let me interrupt you already with a  
13          question. I assume that I'm on the right track in saying that  
14          it's either Wheatcraft or nothing? You're not going to rely on  
15          anything else for that, are you, to answer the question?

16          MR. AXLINE: With respect to CMO 60, no.

17          However, we did submit additional causation evidence  
18          in the form of Mr. Herndon's declaration stating that each  
19          station that was within the capture zone of a well or group of  
20          wells will contribute MTBE to those wells.

21          So, with respect to CMO 60 we're relying on  
22          Mr. Wheatcraft. But with respect to causation more generally  
23          of the type that's involved in the City of New York case we  
24          also have the declaration of Roy Herndon.

25          THE COURT: I think the case that is most analogous

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1 now is Fresno. Is this the same as Fresno and should be  
2 dismissed?

3 Now I realize the difference is you've got yourself a  
4 fate and transport expert, which is Wheatcraft, but then the  
5 answer is all Wheatcraft.

6 Okay. Let's get started.

7 MR. AXLINE: So Mr. Wheatcraft's task was to identify  
8 whether the stations that we had identified contributed to a  
9 plume.

10 THE COURT: Right.

11 MR. AXLINE: And then whether that plume contaminated  
12 wells.

13 We base our understanding not -- just on CMO 60 itself  
14 but also on the runup to CMO 60 which involved a fair amount of  
15 back and forth between the defendants and the plaintiffs as to  
16 how to frame the case.

17 The defendants started off complaining that we had too  
18 many plumes and stations and that the case was unmanageable for  
19 that reason. So, we made the point that regardless of whether  
20 an individual station contaminated an individual well we were  
21 also going to have other stations that contaminated the same  
22 well and that we've only identified one station and one well,  
23 the defendants were then going to start pointing fingers at  
24 each other saying well that contamination came from station X,  
25 Y, or Z not from station A which is my station.

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1           So, to solve that problem, in part, we shifted to the  
2           idea of plumes where we were going to identify the plumes that  
3           would include the stations that we thought were culpable for  
4           the contamination in a well, which we did.

5           We then asked Mr. Wheatcraft to look at whether the  
6           releases at each individual station that was associated with an  
7           plume contributed MTBE to that plume. And he did. He looked  
8           at all of the results from each station, modeled where that  
9           MTBE was going, and concluded that each station did, in fact,  
10          contribute to the identified plumes.

11          Now, once it gets to a plume it's sort of like a  
12          passenger getting on a train. At the station the passenger is  
13          on the train. The next stop is the well.

14          And this is uncontested in terms of the evidence  
15          because the defendants submitted no expert testimony or  
16          declarations in support of their motion.

17          Once the MTBE is on the train, so to speak, it's got  
18          to plume. Then there's nothing that stands between that  
19          passenger getting on at the plume station and getting off at  
20          the well station, which is where Mr. Wheatcraft concluded the  
21          plumes would have an impact.

22          So that is all --

23          THE COURT: So let me just ask the question. So I  
24          understand.

25          So are there 31 stations in play here. Basically are

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1 you saying Wheatcraft's testimony is that each of these 31  
2 contributed to the plume in its area and that plume is going to  
3 contaminate the production well. So he doesn't --

4 MR. AXLINE: Yes.

5 THE COURT: So he doesn't have to say station A  
6 contributed X amount or X quality but just I know that station  
7 A is part of plume A, something like that?

8 MR. AXLINE: Yes.

9 THE COURT: Well then why did he say he's not done any  
10 models in which we isolated a particular source and ran only  
11 that source? What does that statement mean?

12 MR. AXLINE: Well, what the defendants are saying is  
13 that he --

14 THE COURT: I didn't ask you that. Wait. Wait.  
15 Wait. Wait. I don't care what the defendants are saying. I  
16 want to know what that statement means to you.

17 He said in his declaration, and I'm quoting. He's not  
18 done any models in which we isolated a particular source and  
19 ran only that source.

20 So I'm just asking you: What does that mean? Your  
21 witness said it.

22 MR. AXLINE: That means I think pretty  
23 straightforwardly that he didn't break out individual stations  
24 and trace only that station to only individual wells.

25 THE COURT: I'm still a little confused. You're



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1 saying he does affirmatively know that station A contributed to  
2 plume A? But what doesn't he know?

3 MR. AXLINE: Yes.

4 THE COURT: Then what doesn't he know about station A?

5 MR. AXLINE: Well, he didn't determine, for example,  
6 how much of the contamination from station A it will be. He  
7 might have been able to determine that if it had been his  
8 responsibility to do so. But that wasn't his task. That's  
9 what he didn't do. He didn't do a quantification. That's in  
10 the defendants' camp when the liability is joint.

11 THE COURT: Right. So when he says we didn't do any  
12 models in which we isolated a particular source and ran only  
13 that source, you think that that's all that that means; that we  
14 can't say that the plume that eventually hits the well is five  
15 percent made up from station A. That's what he can't do?

16 MR. AXLINE: He didn't do that. That's correct.

17 THE COURT: You think that's all the statement in the  
18 declaration means?

19 MR. AXLINE: Yes.

20 THE COURT: But you think he affirmatively does  
21 testify either at deposition or declaration or expert report  
22 that station A's release is part of the plume that's going to  
23 hit production well B? It has hit or will hit?

24 MR. AXLINE: Absolutely. Yes.

25 In appendix A he identifies the stations that are

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1 associated with each plume.

2 THE COURT: He identifies the station that's  
3 associated with each plume?

4 MR. AXLINE: Yes.

5 And then in his declaration at paragraph 8, carrying  
6 over -- starts on page 1 and carries on to page 2 -- he  
7 indicates which plumes are hitting which wells.

8 THE COURT: Okay. So that was my question to you,  
9 Mr. Axline and that was helpful.

10 Which defense counsel would lake to take the lead in  
11 saying why that isn't sufficient to meet the requirements of  
12 CMO 60.

13 MR. PARKER: Thank you, your Honor.

14 This is Jeff Parker. I will take the lead, although  
15 you are obviously aware there are a lot of defendants involved  
16 in this motion so it's possible someone else may add something.

17 THE COURT: Okay.

18 MR. PARKER: Directly addressing your Honor's issue.  
19 This goes back to the March '07 conference when Mr. Miller  
20 defined a plume and he defined it to be gasoline that  
21 commingles at the well. And your Honor --

22 THE COURT: At the well. Wait. Wait. Wait. Wait a  
23 second. You mean at the production well?

24 MR. PARKER: That is what he said at the March 1, 2007  
25 conference. That's on page 13.

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1 THE COURT: Why is that a problem? If it's part of  
2 the plume that hits the well. That's okay. It still makes  
3 that release site a part of the problem, so to speak.

4 So worrying about allocation or damages is a different  
5 issue. But liability, so long as material from the release  
6 site is part of the plume that hits the well, that sounds like  
7 liability. You can argue later that you can't figure out the  
8 percentage of liability and, therefore, you can't calculate  
9 damages. But that's a different motion than saying there is no  
10 proof of liability.

11 MR. PARKER: I understand that, your Honor.

12 And the next step in looking at this is the Court  
13 actually set that bar at the March 4, 2010 conference when  
14 Mr. Axline attended and said exactly, and this is Exhibit 79 in  
15 our papers, attached to Ms. Roy's declaration, said exactly  
16 what the plaintiff had to do. And that is they have -- is  
17 going to produce at some point a report that says these are the  
18 sources impacting this particular site. Mr. Axline went on and  
19 said: So we will be providing an expert report linking each  
20 station to the well.

21 THE COURT: But he still is. Isn't he saying that  
22 station A is contributing material to plume -- let's call it  
23 plume B and plume B is hitting production well C. So there's a  
24 direct link between A and C that way.

25 MR. PARKER: That's what Mr. Axline said.

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1 THE COURT: Right.

2 MR. PARKER: That's actually not what Dr. Wheatcraft  
3 said. And I think it's important -- for instance plume 1, as  
4 they've -- Mr. Axline just identified. It lists numerous  
5 stations.

6 THE COURT: Right.

7 MR. PARKER: That it attributes.

8 THE COURT: Right.

9 MR. PARKER: Well on the map, if you were to draw a  
10 wide V, bigger than 90 degrees.

11 THE COURT: Right.

12 MR. PARKER: The well -- pointing straight down.

13 The well MBTAMB is straight down at the point of that  
14 V. One station is 4,000 feet to the northeast. Another  
15 station is 6,000 feet to the northwest. Those are two trains  
16 that are never going to hit unless you actually bring them to  
17 the well. And that's what he did not do.

18 THE COURT: No, he didn't. But he says they both  
19 contributed to the plume. And the plume hits the well -- I  
20 mean what I can't do, obviously, Mr. Parker, is try the case on  
21 a motion. I have to always repeat that for all summary  
22 judgment motions. That's the one thing I can't do.

23 So if there is an expert who is not later stricken on  
24 your *Daubert* analysis, which will be a different motion -- but  
25 if there is an expert who says: I realize that A is to the

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1 northeast and B is to the northwest and one is 4,000 feet and  
2 one is 6,000 feet, but their material comes together in the  
3 same plume and will hit the well. If that's what he says it's  
4 not for me to quarrel with him unless he's stricken by *Daubert*  
5 before the trial.

6 But at this point, summary judgment, if that's the  
7 evidence of record, then it seems to me they've solved the  
8 causation problem with acceptable proof.

9 MR. PARKER: Your Honor, I understand that.

10 The reason I was pointing to plume 1 as an example is  
11 because those two points, the direct line from those two wells  
12 never meet unless he actually tracks from the station into the  
13 well.

14 THE COURT: No. No. Why not into the plume?

15 MR. PARKER: Because the plumes are coming different  
16 directions. If they're on a straight line coming radially  
17 towards a well -- they're coming from opposite sides. So the  
18 only way to meet is actually to meet in the well. And he never  
19 says that. He says I never traced from any individual --

20 THE COURT: I don't understand that. You're skipping  
21 the plume.

22 I don't understand why they both -- both release sites  
23 can't release material that finds its way into the plume, even  
24 if the plume, so-called, is the last three feet -- I mean  
25 that's a silly example -- but the last three feet before the

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1 well, as long as he says in his expert opinion -- you can  
2 challenge it when the time comes, either a *Daubert* or a  
3 trial -- that that material from those totally different  
4 geographic sources came together at the plume and then the  
5 plume hits the production well.

6 So it's true he can't go from the station to the well.  
7 But he goes from the station to the plume and then insists that  
8 the plume hits the well.

9 MR. PARKER: But, your Honor, the premise of their  
10 plume concept, going back to what they said in court, was the  
11 typical -- they said typical of California and your Honor noted  
12 also typical of New York. The four corners with a station on  
13 each and a well a long ways away, so they all get together near  
14 the stations and then move towards the well.

15 THE COURT: Right.

16 MR. PARKER: My point of this, and of his entire  
17 exercise, what Dr. Wheatcraft did, is that's not what he has  
18 done. They have taken wells on -- stations on opposite sides  
19 of the well.

20 THE COURT: I heard that. But the whole point of fate  
21 and transport is he's going to, I guess, give expert testimony  
22 that because of the way the material moves through the  
23 groundwater, whatever, it got at some point to the same plume.

24 Now, I'm no expert. I don't know how it could do  
25 that. And I don't know whether that testimony will turn out to

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1 be credible or whether it will even survive *Daubert*.

2 But if that's what he says now, you know the summary  
3 judgment standard. I've got to believe him and I have to draw  
4 the inference in favor of the nonmoving party. So it may  
5 strike you as impossible, and that would be for *Daubert*. But I  
6 need to decide summary judgment.

7 Unless you think, Mr. Parker, that's not what he's  
8 saying. I thought that was what he's saying and maybe  
9 Mr. Axline has to jump back in.

10 Mr. Axline, do I correctly describe what he's saying?

11 MR. AXLINE: Yes, your Honor.

12 THE COURT: I do. He says from the completely  
13 different geographic sources somehow the material comes  
14 together in the same plume. Mr. Axline.

15 MR. AXLINE: I'm sorry.

16 I thought you were asking if you were correctly  
17 representing what Mr. Wheatcraft said.

18 THE COURT: Yes, I am. I am asking that. Is that  
19 what he's saying, that these two very different geographic  
20 location stations that Mr. Parker is talking about, somehow the  
21 material from both somehow gets to the same plume?

22 Is that what he's saying? Is that what Wheatcraft is  
23 saying?

24 MR. AXLINE: Yes.

25 MR. PARKER: Exhibit 79 is where -- the deposition

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1 excerpts from Dr. Wheatcraft. And the plaintiff's  
2 characterization in their papers is different than his  
3 testimony under oath and, frankly, different than his  
4 declaration which says -- he didn't isolate each station. And  
5 the way the model works is they're not mixed at a long distance  
6 like in a tank, for instance.

7 THE COURT: No.

8 MR. PARKER: He said they're from different spots.

9 THE COURT: Yes.

10 MR. PARKER: The way the modeling experts do this is  
11 they can isolate each station and show that a station, actually  
12 its contamination got there.

13 THE COURT: You can't say "got there." Got where?

14 MR. PARKER: Got to the well.

15 THE COURT: But he's not.

16 He's stopping at the plume. And he is saying -- I  
17 mean -- I don't know how many times I should say it. He may be  
18 wrong. It may not even be a possible theory that can survive  
19 *Daubert*. But what he is saying is that somehow the material  
20 from the two very distinct stations that are geographically  
21 separated got to the same plume, joined together, created one  
22 plume and that plume got to the well. That's his theory.

23 MR. JOHN ANDERSON: Your Honor, this is John Anderson.  
24 If I may just add one point?

25 THE COURT: Right.



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1 MR. JOHN ANDERSON: That points is -- I'm the one who  
2 took Dr. Wheatcraft's deposition. I've been through this in a  
3 lot of detail.

4 What Dr. Wheatcraft did not say in his attempt to  
5 salvage what he did in trying to defeat this motion is he does  
6 not say that the entire plume or any defined amount of the  
7 plume will ever get to the well. All he says is it goes into  
8 the plume and the plume contaminates the well.

9 THE COURT: Right.

10 MR. JOHN ANDERSON: And if you juxtapose that against  
11 his testimony under oath in the deposition. In the deposition  
12 he acknowledged that he did not establish that any MTBE from  
13 any station itself got to the well. So what he's done in  
14 assessing the issue is simply said that some part of the plume  
15 will get to the well. He does not say that the parts that were  
16 contributed by the individual --

17 THE COURT: I know. But that takes me back a decade.  
18 I mean that takes me back to the commingled product theory. I  
19 don't think you can disentangle material that's combined in a  
20 plume and say okay I know that these following -- that releases  
21 at six stations got together to form a plume but then I can't  
22 tell you which station's material is the part of the plume that  
23 hit the well. That would be impossible because it's as if it's  
24 a tank. That plume is like a tank. It's now got material from  
25 six different sources all mixed up in one big tank. And to

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1 say -- wait. If you had a tank and you siphoned off one gallon  
2 into somebody's well or car or something you wouldn't know  
3 whose molecules were in that gallon and that's what I said  
4 years ago. This is a combined gas or liquid, whatever I said,  
5 I said then and I still believe that.

6 So if all these releases from six places got all  
7 commingled in one plume, I don't think anybody can say when it  
8 hit the well. Oh, that must have been only from station A but  
9 not B through E. That's impossible. It's all mixed up.

10 So that's at least my image. I'm not a scientifically  
11 sophisticated person. But that's my image of "coming together  
12 in the plume."

13 MR. JOHN ANDERSON: This is not a tank. This is a  
14 geographic area that covers many, many square miles.

15 THE COURT: Right.

16 MR. JOHN ANDERSON: And the laws of hydrogeology, the  
17 laws of physics apply to each molecule.

18 THE COURT: Right.

19 MR. JOHN ANDERSON: I will represent to you, and I  
20 don't think Mr. Axline will deny this and, in fact,  
21 Dr. Wheatcraft testified. He is, in fact, capable of doing  
22 that analysis of those molecules from each station. This is  
23 not a situation where you have a tank, got all jumbled up and  
24 we can't identify what came out the spigot. This is a very  
25 large and very diverse geographic area.

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1 THE COURT: That's what a plume is?

2 MR. JOHN ANDERSON: I'm saying that this plume that  
3 he's talking about.

4 THE COURT: Right.

5 MR. JOHN ANDERSON: Is a large, multi-square-mile  
6 area. Mr. Parker actually has the map. He can tell you the  
7 tremendous amount of area that Dr. Wheatcraft is including in  
8 this model.

9 My point is that Dr. Wheatcraft acknowledged that he  
10 did not determine whether molecules from my station or  
11 Mr. Parker's station or Mr. Condrion's station did or ever will  
12 get to a well.

13 THE COURT: Wait. I do want -- hold on. I understand  
14 that. But what you've added is that -- you're saying he also  
15 testified that he could have done it but didn't. That's the --

16 MR. JOHN ANDERSON: But did not.

17 THE COURT: That's the surprise to me. He said he  
18 could have done that. In other words, he traces it as far as  
19 the plume. And then he kind of quits and says the plume hits  
20 the well but I could have figured out whether station A's  
21 material was in the part that hit the well but I didn't bother.  
22 That's what you're describing.

23 MR. JOHN ANDERSON: Correct.

24 THE COURT: Well that's surprising.

25 Okay. Mr. Axline, could you respond to that, that he

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1 could have done it but just gave up or laid back or just didn't  
2 bother.

3 MR. AXLINE: Well, it's not quite that simple as you  
4 might imagine, your Honor.

5 The defendants initially when we began this case  
6 complained that we were going to be doing exactly what  
7 Mr. Anderson described and that that was far too much and that  
8 we needed to take a different approach. And that different  
9 approach was to identify plumes.

10 And the plumes were defined not as Mr. Parker  
11 described it to you but, rather, formally in CMO 25 because of  
12 the dispute over what the impact of having these different  
13 stations would be. And CMO 25 states in subpart (b) that  
14 OCWD's reply submission shall identify the, quote, plumes of  
15 which OCWD is currently aware. The term "plume" is now  
16 understood to mean a mass of contaminant originating from one  
17 or more sources.

18 THE COURT: Okay. My question to you is Mr. Anderson  
19 just argued, that's fine, you've got the station material as  
20 far as the plume. But he could have -- he could have then said  
21 yes, the plume hits the well -- not all of it, it's hundreds of  
22 square miles, so the tip of it, the southern tip, the northern  
23 tip -- some part of it begins to hit the well. And he could  
24 have figured out whose material was in the part that hit the  
25 well.

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1           Is that true or not true? Did he acknowledge he could  
2 have but just didn't? That's what I wanted your response to.

3           MS. O'REILLY: Your Honor, this is Ms. O'Reilly. I  
4 can address that question very briefly. I worked with  
5 Dr. Wheatcraft on his modeling.

6           THE COURT: Well then go ahead.

7           MS. O'REILLY: What Dr. Wheatcraft said is it may be  
8 possible. It's very -- nearly impossible because of the way  
9 the model is constructed and the way you have to track it.  
10 Every time you run a fate and transport model you have to run  
11 all of the production wells that are running. And you have to  
12 run all of the groundwater.

13           So to track an individual station is -- you can  
14 potentially run it, but then you have all of these other  
15 complications, all of the other MTBE coming in and you can't do  
16 a point-to-point tracking like they are suggesting given the  
17 size of the model and the size of the area.

18           And what we Wheatcraft explained is if defendants  
19 wanted -- their experts got it. He said if you want to try and  
20 do it, you can try and do it. Their experts didn't do it.

21           THE COURT: But Wheatcraft said he could do it or  
22 he --

23           MS. O'REILLY: He said it may be possible if you  
24 have -- they didn't ask him what was required to do it. And  
25 it's a very complex process in order to do that. And they

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1 didn't ask him what it would take to do that. They simply  
2 asked him the question: Is it possible? He said: It may be  
3 possible. But it's a very complex process and they didn't ask  
4 him what it would require to do that.

5 THE COURT: Well do you agree with Mr. Anderson that  
6 only a part of a plume actually then is in contact with the  
7 well and that it is possible that one could isolate whose  
8 material is in that part of the plume? Because it still sounds  
9 strange to me, but I'm not deep into science and you and  
10 Mr. Anderson are.

11 MS. O'REILLY: No, I don't agree. But it's not  
12 realistic. It's not reality. And what Wheatcraft did was  
13 model was the reality is.

14 THE COURT: And the reality, according to you, is that  
15 you really can't disentangle the identity of the molecules in  
16 the part of the plume that hit the well? Is that the reality?

17 MS. O'REILLY: Yes, your Honor. Just as you described  
18 it in your discussion with Mr. Anderson.

19 THE COURT: Okay. So that is your theory.

20 MR. AXLINE: Mr. Wheatcraft's declaration in paragraph  
21 10 also makes the point -- I'm reading from his declaration  
22 now -- that "The only exit for water from the aquifer is  
23 through production levels. OCWD's 2009 groundwater management  
24 plan indicates that 98 percent of water in the aquifer will  
25 eventually exit to production wells."

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1           So even if Mr. Anderson were correct, Mr. Wheatcraft  
2 makes it plain that the MTBE that was released from these  
3 stations is going to impact production wells like --

4           THE COURT: And you said "is going to," is going to.  
5 In this case you're talking about actual harm and threatened  
6 harm?

7           MR. AXLINE: Yes.

8           THE COURT: Okay. Go ahead.

9           Now, Mr. Parker, I think what was next?

10          MR. PARKER: Yes. Thank you, your Honor.

11          To answer the specific question you posed to  
12 Mr. Axline and Ms. O'Reilly, Dr. Wheatcraft was asked in his  
13 deposition, and this is Exhibit 73, page 58 of the PDF filing  
14 but his transcript page 116 starting. The question starts on  
15 line 2. And in the question: "Are you able, based on your  
16 modeling, to identify which service station caused the  
17 contamination which resulted in MTBE arriving in and being  
18 detected in individual wells?"

19          The answer: "The model could be used to do that. I  
20 have not been asked to do that and I have not done it. I  
21 haven't done so."

22          He goes on to ask about modeling individual sites.  
23 And he repeatedly says: We did not analyze or isolate a  
24 particular station in the course of our modeling.

25          So he admits in the pages in the record that he could

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1 have done it and this model could be used for it. He admits  
2 that he didn't do it.

3 And it's their burden to show normal causation, it's  
4 not possible to show another way, before going on to some  
5 alternative method. He admits right there that they made a  
6 choice to not analyze it in that way.

7 THE COURT: But given Mr. Axline's last argument, it's  
8 not as if only a tip of an iceberg is what hits the well.  
9 According to Mr. Axline, if I understood what he said,  
10 eventually 98 percent of this material or this plume will, in  
11 fact, eventually come in contact with the production well.  
12 Unless I misunderstood.

13 Is that what you said, Mr. Axline?

14 MR. AXLINE: That was correct. That's paragraph 10 of  
15 Mr. Wheatcraft's declaration.

16 THE COURT: I just want to make sure I summarized it  
17 correctly.

18 MR. AXLINE: You did.

19 MR. PARKER: Your Honor, based on that. That is an  
20 extremely broad general opinion not applicable to any  
21 particular site.

22 THE COURT: No. It's applicable -- in the end it's  
23 applicable to every site. I mean I think I'm understanding  
24 this.

25 Again, it may be theoretically possible. It may not



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1 be worth it because essentially all of the material that hits  
2 the plume is either hitting the well now or will over time.  
3 And if it's really as high as 98 percent there is this hot new  
4 word called proportionality. How much more would I require or  
5 would plaintiffs have to spend if it's virtually all going to  
6 get there even if it's over decades. We faced this idea in the  
7 City of New York case that things may not happen for 50, 60  
8 years. But the Circuit affirmed that notion of injury. So  
9 it's all going to get there sooner or later. And if he can  
10 trace it from the station to the plume, and that's what this  
11 argument started out with, then it may be that causation is met  
12 for now, for summary judgment.

13 Don't get me wrong. You have many other motions. I'm  
14 just trying to focus on this one because it's the whole case.  
15 There are still other motions and other attacks that have to be  
16 reached if I get over this one. And then you get another shot  
17 at *Daubert*. And then you get another shot at trial. So it's  
18 certainly not over. It may be that when you get to trial, if  
19 the plaintiff survives *Daubert*, the jury won't buy this.

20 MR. JOHN ANDERSON: What Mr. Axline actually read from  
21 Dr. Wheatcraft was, and I'm not sure if you read it correctly,  
22 but what he said was that 98 percent of the water --

23 THE COURT: Yes.

24 MR. JOHN ANDERSON: -- will eventually --

25 THE COURT: Yes.

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1 MR. JOHN ANDERSON: -- mix into drinking water wells.

2 THE COURT: Yes.

3 MR. JOHN ANDERSON: It was not any testimony about  
4 this plume. And it has no time limit on it whatsoever.

5 THE COURT: Right.

6 MR. JOHN ANDERSON: And we all know for this case that  
7 we're talking about not tens of years. There's water in the  
8 aquifer that has been dated as hundreds and hundreds of years  
9 old.

10 That statement was not about the plume. And that  
11 statement was not about any of the wells that are involved in  
12 this case.

13 That statement was a general statement that if you go  
14 indefinitely into the future eventually this water is going to  
15 come out.

16 THE COURT: Right.

17 MR. JOHN ANDERSON: And if you think about that, the  
18 concentration of MTBE in the entire aquifer that eventually  
19 comes out as dozens or hundreds of wells would be parts per --  
20 you can't even imagine how low that would be.

21 THE COURT: Right.

22 MR. JOHN ANDERSON: That was a statement that was not  
23 directly involved in this particular case. And we get back to  
24 CMO 60 where we started off this argument.

25 THE COURT: Right.

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1 MR. JOHN ANDERSON: The plaintiff had the burden of  
2 showing that MTBE contamination from specific stations would  
3 get to specific wells. Dr. Wheatcraft admitted to me in the  
4 deposition many times that he could have done it but he was not  
5 asked to do so. And as Mr. Parker accurately pointed out this  
6 is the plaintiff's burden. They did not meet it.

7 THE COURT: I know you're an advocate and you have to  
8 put it as strongly as that but I feel obviously somewhat stuck  
9 in the middle here. It may be I have to accept a supplemental  
10 declaration where he explains what he meant by "I could have  
11 done it." What would it take to do it? Would it take years?  
12 Would it take billions of dollars? Maybe he better explain  
13 what he means by "could have been done." Because  
14 Ms. O'Reilly's argument and Mr. Axline's argument is sort of  
15 there's a theoretical possibility but, no, we didn't require it  
16 because it would be so -- so difficult as to come near the word  
17 impossible. At least that's how I'm hearing them.

18 But I don't know if that's true. I may be making that  
19 up. It may be he could have done it in two months for not a  
20 lot of costs or it would have taken years for a ridiculous  
21 cost. So I don't know the answer to that and I'm kind of stuck  
22 without it.

23 So since I do care to get this right -- it's an  
24 important case, it's been around a long time -- I'm not adverse  
25 to allowing him to explain the answer that "it could have been

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1 done."What would it take to do it? Why didn't he do it? And  
2 maybe it does reach the point of near impossibility or maybe  
3 not. Maybe they just didn't want to go there because they  
4 didn't want to meet their burden and find out who's in and  
5 who's out. But lawyers are submitting the declaration and  
6 lawyers have ethical obligations. So he can't just not face  
7 that question. He has to meet that question and explain what  
8 it means to say it could have been done or could be done. I  
9 need to understand that.

10 Mr. Axline or Ms. O'Reilly, do you know the answer of  
11 what he meant by it could have been done?

12 You implied, Ms. O'Reilly that you know the answer and  
13 it's not realistic. How do you know that? What does that  
14 mean?

15 MS. O'REILLY: Well I don't know the answer  
16 specifically. I was at Dr. Wheatcraft's deposition. I  
17 defended it. And my understanding was that it is nearly  
18 impossible.

19 THE COURT: But I don't have that in the record.  
20 That's your understanding.

21 MS. O'REILLY: They didn't ask that question.

22 THE COURT: Well, they did. They asked if it's  
23 possible. And he said a number of times it is possible, I  
24 wasn't asked. I mean that's in the record.

25 MS. O'REILLY: They only asked once could it be done

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1 and they didn't ask what it would take.

2 THE COURT: Well I'm asking now. I need to understand  
3 why there is, forgive the phrase, that particular failure of  
4 proof. It may be because it's not realistically possible. But  
5 I need something in the record because if it's as easy as  
6 snapping your fingers one would have thought he would have done  
7 it. I suspect it's not that easy. But on a spectrum from  
8 snapping your fingers to taking a decade, I don't know where in  
9 the spectrum it would fall.

10 It is your burden. Since you didn't do it I think you  
11 need to at least go back to this guy and have him explain his  
12 answer.

13 Mr. Axline first.

14 MR. AXLINE: I understand what your Honor is saying.  
15 We'll of course be happy to oblige.

16 I would just make the point, however, that  
17 Mr. Wheatcraft's declaration was that the plume, not a portion  
18 of the plume, but the plume would impact these specific wells.  
19 And the defendants have not submitted a single declaration in  
20 opposition to that or a declaration from one of their experts  
21 saying that some portion of the plume that is their station is  
22 not going to hit the wells.

23 THE COURT: Well, I understand that.

24 But, look, they're saying it's your burden of proof.  
25 And they are making the argument, at least, that a plume that's

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1 50 square miles or something is not hitting a well, all 50  
2 squares miles. So it is a portion. It is the geographic  
3 portion that is closest to that production well.

4 And then the next part of the argument is if it's only  
5 that portion it could be figured out whose material is in that  
6 portion. Now that is not what I pictured. As I said, I  
7 pictured a tank-like entity -- even though it's a very huge  
8 tank -- where it's all mixed up and you could never disentangle  
9 it and you could never know whose material is hitting the  
10 production well.

11 But Mr. Anderson said I'm wrong and that if you  
12 understand physics and other sciences you actually could know  
13 which part of the plume has whose material and which part hits  
14 the well.

15 You're saying that's his argument, but he doesn't have  
16 any proof of that. That's all well and good but he's saying  
17 it's your burden of proof to show that the material from the  
18 stations got to the well.

19 Now you're saying you've met it because Mr. Wheatcraft  
20 uses the word "plume," the plume hits the well. He doesn't say  
21 a portion of the plume or the southernmost portion or the  
22 portion geographically down-gradient closest. He just says the  
23 plume hits the well.

24 MR. AXLINE: Yes. And I also think we're entitled to  
25 the presumption on the summary judgment motion.

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1 THE COURT: Sure.

2 MR. AXLINE: I think currently where our evidence is  
3 unopposed that the -- you know, any inferences are going to be  
4 drawn in our favor. Now somehow the defendants are trying to  
5 shift that.

6 THE COURT: Well because they're saying that I have a  
7 wrong image of a what plume looks like. It's not one big tank.  
8 It's fifty square miles or a hundred square miles. And it is  
9 hard to imagine that a hundred square miles hits something as  
10 small as a production well all at the same time. It obviously  
11 doesn't. Obviously there is a point, a point in that plume  
12 that makes contact and not the whole thing at once. So that --  
13 okay.

14 MR. AXLINE: Understood, your Honor.

15 THE COURT: But assuming that's true, my new  
16 understanding of plume, then it begs the question of whether  
17 you can tell whose material is in that point of contact. And  
18 I'm not so sure that is possible, Mr. Anderson says it is. And  
19 he says that Mr. Wheatcraft says it is. That's why I'm asking  
20 for Mr. Wheatcraft to explain whether that's really accurate.

21 Is he saying that the initial point of contact between  
22 a plume and a well, one could figure out whose material is in  
23 that point of contact?

24 Still sounds surprising to me. But if that's what he  
25 says and that's what he means, I'd like to know it.

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1 MR. JOHN ANDERSON: Your Honor, John Anderson. If I  
2 may?

3 THE COURT: Yes.

4 MR. JOHN ANDERSON: First of all, I asked  
5 Dr. Wheatcraft if he could do it as part of his model. He said  
6 yes, he could. Mr. Parker read that testimony.

7 I will tell you I have ten or twelve years of  
8 experience with Dr. Wheatcraft. And we successfully had a  
9 *Daubert* motion granted against him in the Crescenta Valley  
10 case. And we're not at that point yet.

11 I am not saying that Dr. Wheatcraft is capable of  
12 predicting anything, if you look at the overall context  
13 factually. But that's not part of this motion.

14 But when he endeavors to model what happens to  
15 contaminants when they get into the subsurface and into the  
16 water, when he goes through that effort, he is capable as part  
17 of that effort -- in fact, I will posit to you that it's  
18 actually easier to model a single station than it is to model  
19 the entire group of stations that he did. He's capable of  
20 breaking that out as part of the process. And he did not do  
21 so.

22 Within the context of what he did, he could have  
23 modeled the individual stations so that the plaintiff could  
24 have put on some kind of evidence -- we think it would have  
25 been very weak -- but could have put on evidence on a



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1 station-by-station basis, but they chose not to do that.

2 THE COURT: Well Mr. Axline started with the history  
3 of that. And he says while that may have been their initial  
4 approach, apparently the defendants objected in some way and  
5 said that was way too complex and they came back and said, all  
6 right, then we'll do it by plume.

7 MR. JOHN ANDERSON: I will defer to Mr. Parker or  
8 Mr. Correl to talk about that history. But I am quite certain  
9 that that is not what happened in terms of the reasoning and  
10 what went on for the identification --

11 THE COURT: Well then why did we get involved with  
12 plumes as opposed to going directly from station to well?

13 MR. PARKER: That process started with them listing  
14 550 plumes initially. And we started to go down the  
15 designation road from there.

16 And they didn't want a single well and station pair  
17 with a plume coming from station X. They wanted -- we were in  
18 front of your Honor multiple times because the defendants  
19 thought if you want a plume from station X, then let's identify  
20 that plume and do discovery on that plume.

21 They then defined the plume as this -- as a well and  
22 what comes in from all directions to it.

23 THE COURT: Right.

24 MR. PARKER: Which is how they were able to get more  
25 stations in the mix. Because we thought ten plumes means ten

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1 stations.

2 THE COURT: No. I never understood that. I always  
3 thought a plume was a mixed entity; in other words, it drew  
4 from many sources. So I always understood it that way.

5 I think I've gained as much I can from this argument.  
6 I do think that Mr. Axline should contact Mr. Wheatcraft and  
7 have him explain the answer that he could have done something  
8 that he didn't do, what does that mean.

9 MR. AXLINE: Understood, your Honor.

10 But let me close my portion of this by making the  
11 following point. It was not our understanding that it was our  
12 burden to make that kind of a showing.

13 THE COURT: Well, wait a minute. Wait, wait.

14 Mr. Axline you know I can't interrupt easily. What do  
15 you mean, it wasn't your understanding that you had to make  
16 that showing? Of course you had to try to identify which  
17 stations contributed to the impact. That's CMO 60.

18 MR. AXLINE: Yes.

19 THE COURT: So what the defense is saying is that  
20 merely getting it to the plume is not sufficient to get it to  
21 the well and that you could have gotten it to the well and just  
22 quit on the last step, from plume to well. That's what this  
23 argument boils down to.

24 MR. AXLINE: Right. And I don't want to let the  
25 hearing resolve without making clear that in our view it was

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1 our burden to get it to the plume and then to get the plume to  
2 the well, which we did.

3 So it is, as Ms. O'Reilly said, I think difficult to  
4 make it from a station to a well. We had a lot of stations.

5 So I just want to make it clear for the record that in  
6 terms of our position of the summary judgment motion that was,  
7 in our view, adequate. We are, of course, going to do as your  
8 Honor asked.

9 THE COURT: Well and review this transcript and think  
10 about it.

11 Can I get a little insight into that reference about  
12 Crescenta Valley. Was that after the remand? There was a  
13 *Daubert* --

14 MR. JOHN ANDERSON: Yes. We had written motions. The  
15 *Daubert* motion against Dr. Wheatcraft was one of them. And  
16 following the hearing on that written *Daubert* motion -- it was  
17 actually a motion in limine -- the Court ordered that we would  
18 have a full day of testimony by Dr. Wheatcraft and by  
19 Dr. Wilson who is -- was the defendant's expert in that case.  
20 And we had a full day of testimony, most of which was  
21 Dr. Wheatcraft. He was put on by Mr. Miller. He was  
22 cross-examined by me and Mr. Meadows. And months later, at the  
23 conclusion, the Court granted the *Daubert* motion and excluded  
24 Dr. Wheatcraft from testifying in that case. Now, it was  
25 settled before it went to trial but he was excluded by court

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1 order.

2 THE COURT: Well I wondered what the end of the story  
3 was. What judge was that?

4 MS. O'REILLY: Judge Tucker.

5 MR. JOHN ANDERSON: Yes. Judge Tucker.

6 Judge Tucker has since changed her last name, went  
7 back to her maiden name. That's why I was drawing a blank.

8 THE COURT: What is her name now?

9 UNIDENTIFIED SPEAKER: Staton.

10 THE COURT: Now I know who that is.

11 So she ruled it out. Then the case settled. So it  
12 was never reviewed on a higher level. And that's what we know  
13 about it.

14 Right. That's what we know about it. Okay.

15 Did he do a similar analysis to this in the Crescenta  
16 Valley case, Mr. Axline or Ms. O'Reilly, I guess?

17 MS. O'REILLY: It was a different issue, your Honor,  
18 because there we were focused on a smaller number of stations  
19 and directly on production models.

20 MR. CORREL: There in that case he did exactly what he  
21 said he could have done in this case. He traced it by station  
22 to various wells.

23 MS. O'REILLY: It was a different --

24 THE COURT: No. I understand.

25 When was her decision, roughly?

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1 MR. JOHN ANDERSON: It was about two years ago. I  
2 don't remember the exact date.

3 THE COURT: I guess one of you could forward it to my  
4 clerk, right?

5 MR. JOHN ANDERSON: That would be our pleasure.

6 THE COURT: Okay. Why don't you do that.

7 Okay. In any event, as I said, I think I've gotten  
8 what I can from this phonecall. So I thank you all and remind  
9 you that there will be a record.

10 Thank you.

11 MR. PARKER: Your Honor, is the plaintiff to submit an  
12 affidavit of their expert?

13 THE COURT: Yes.

14 MR. PARKER: Okay. When the defendants get that --

15 THE COURT: We'll see. Let's see what we get.

16 Okay. Thank you. Bye-bye.

17 (Adjourned)